DOCUMENT RESUME

ED 215 684 IR 010 147

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TITLE Private Use, Private Property and Public Policy: Home Recording and Reproduction of Protected Works.
PUB DATE Sep 81
NOTE 20p.; Paper presented at the meeting of the Internationale Gesellschaft fur Urheberrecht (Toronto, Canada, September 23, 1981). Best available copy.

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Audiotape Recordings; *Copyrights; *Court Litigation; *Federal Legislation; Foreign Countries; Guidelines; Mass Media; Technological Advancement; *Videotape Recordings
IDENTIFIERS *Copyright Law 1976; Fair Use; *Off the Air Recordings

ABSTRACT

This discussion of the difficulties of protecting copyright for audio and video recordings focuses on the application of the 1976 Copyright Act and the Fair Use principle to educational off-air taping and private home recording. Court cases such as Encyclopedia Britannica Educational Corporation versus Crooks and Universal Studios, et al. versus Sony Corporation of America, et al. are discussed as well as German and British copyright legislation. (RBF)

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PRIVATE USE, PRIVATE PROPERTY AND PUBLIC POLICY: HOME RECORDING AND REPRODUCTION OF PROTECTED WORKS

by

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IR010147

REMARKS OF
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United States Register of Copyrights
to the

Internationale Gesellschaft fur Urheberrecht
(INTERGU)

Toronto, Canada - September 23, 1981

PRIVATE USE, PRIVATE PROPERTY AND PUBLIC POLICY: HOME RECORDING AND REPRODUCTION OF PROTECTED WORKS

I. Introduction.

Nowadays, above all else, technology dictates the content of our copyright laws and plots their course into the future. In the last 20 years, more than ever, copyright specialists have been preoccupied with problems falling under the heading of "new technology." The problems arising from the relationship between copyright and new technologies are, however, not new. Copyright originated in technological change -- the printing press; and at each stage in the history of copyright law, technological innovation has been a central problem to policy makers. However new the computer may seem, however strange or exotic laser holography, the video disc and direct satellite broadcasting, the central questions they pose for authors, disseminators and users have been with us a long time.

The contemporary attitude toward our generation's copyright problems with new technology is ambivalent: optimism over the prospects of new markets, new modes of education, and new sources of consumer satisfaction is tempered by anxiety over the dangers of irretrievable loss of control over copyrighted works because of that very technology. Videocassette recording technology is only a simple and clear example: educators are eagerly and imaginatively exploiting this new tool, the prospect of large video sale and rental markets is excitingly attractive, yet, the motion picture and television production industries sense

that recording equipment can blight markets for rentals and sales to consumers, and even the broadcast market as well. In short, in the area of new technologies and elsewhere, domestically and internationally, copyright is pressed to keep pace with changes, for the benefit of authors and proprietors; and in some quarters questions are raised about whether copyright can keep pace at all.

This is unfortunate, because copyright, as the principal instrument for protection of author's rights, is widely accepted throughout the world. The principle is clearly stated in the preamble of the Universal Copyright Convention: that a universal copyright system

> "will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts...."

And throughout the world, and under the international conventions, copyright has extended and expanded to accommodate that principle to new kinds of works, and to new uses of works. Whatever its basis anywhere -- reward or incentive, privilege or natural right -- the exclusive rights of the author have always been rooted in economic realities. Protection for the creations of authors may be based upon recognition of the special role of creative artists in shaping national or human culture. The nature of such protection, however, depends upon the marketplace in given societies. We may dwell in the sublime realms of Don Quixote's vision only if we also are properly mindful of Sancho Panza's more earthly concerns.

Applying this instrument of copyright to contemporary conditions has not always been easy. The adaptation of copyright rules to technology began with piano rolls and jukeboxes, then with motion pictures, broadcasting, sound recordings and television, and recently with computers, cable television and

photocopying machines. The questions which arose were varied and difficult. The marvel is that the adaptation occurred in the United States as efficiently as it did, since it was largely accomplished by judicial decision. But courts can only go so far, particularly when they are forced to compromise conflicting interests when statutory guidance is absent, or unclear. The marketplace of the 20's and 30's was smaller and more amenable to gradual, judicial expansion of copyright. Today, we may not have the luxury of assessing technological impact at our leisure.

Technology now presents copyright with especially troublesome problems of adaptation. The rate of technological change has accelerated, and accordingly, the strains on copyright have intensified. There has also emerged a new problem different in kind: how to control uses of copyrighted works which are not readily detectable, and therefore not readily policeable. Until recently, nearly all infringements of copyrighted works were public, and so visible at their source, that enforcement of copyright presented no special problems, particularly after the appearance of collecting societies.

Take, for example, the cinema market of the 1930's. Replication was strictly controlled; distribution was only through a limited number of theaters; and filmmakers did not even part with ownership of their prints. Contrast this with the multi-tiered markets for motion pictures today: theaters, television, cable, MDS, cassettes, special educational and 16 mm. markets. And the same reproduction devices once used only by the copyright owner are now widely owned; and accordingly, copyright owners are confronted with the problem of controlling unauthorized copying of protected works with these devices. Now in these new problem areas, we must decide whether we can devise and use the equivalent of the theater-era box office to collect payments for use, or whether we must throw up our hands and accept all home copying as lawless but uncontrollable, or lawful because it is uncontrollable.

This paper, directed primarily at private home taping, will not deal at any length with commercial piracy, but will briefly treat the closely related problem of educational off-air taping -- the latter because there are present efforts in the United States to develop guidelines, and I believe that activity will be of interest to this audience.

II. Audio and Video Taping: Practices and Problems.

Audio and video recording equipment are used by many different groups including unauthorized commercial "pirates," schools, libraries, archives and other non-profit organizations, and private individuals. Each of these uses presents different concerns, interests, and potential dangers. While this paper focusses on private home taping, a few words about each kind of taping may be useful.

Unauthorized Commercial Recording. In recent years there has been rapid growth in the unauthorized reproduction and distribution of copyrighted sound recordings and audiovisual works in copies or phonorecords. It poses a threat not only to the recording and motion picture industries, but to the public.

In fact, film and record piracy has become epidemic around the the world, as the participants at WIPO's recent Worldwide Forum on the Piracy of Sound and Audiovisual Recordings well know. In the United States, this form of unauthorized recording is clearly an infringement under section 106 of the copyright law. Sanctions, both civil and criminal, are available under Chapter 5 of the law to deal with this situation. However, experience since 1976, coupled with the recent developments in technology, indicates that the present criminal sanctions, especially the length of the prison terms, should be increased in the hope of restraining those who illegally interfere with the legitimate market for sound

recordings, motion pictures, and other protected works; and legislation to achieve that purpose is now pending before the Congress.

Educational Recording. Educational uses of television and radio programming is not a sub-species of the larger issue of home taping. Educational off-air taping is not merely a matter of personal convenience. Film and video are so much a part of world culture and modern history that education without the moving image would be incomplete. Educational off-air taping can take several forms: spontaneous taping for a single user, or librarying for repeated use, perhaps in several cooperating educational institutions. The materials taped off-air may be unavailable from authorized sources, or they may in fact be works specifically created for sale, rental, or broadcast to schools.

Private Home Recording. Home recording by individuals for their own personal, private use has flourished in the United States. Its scope and growth have caused concern to copyright owners. While recording of both audio and audiovisual works represents potential harm to copyright owners, their individual character, reasons for recording and possibly differing legal treatment warrant separate analysis. People record audio works at home primarily to build a library for repeated enjoyment. Audiovisual works, on the other hand, by their length and nature, have a limited reuse value. This difference, when coupled with the present high cost of blank video tape (as opposed to blank audio tape), somewhat reduces the immediate prospects for extensive librarying of audiovisual works.

If not for librarying, then why is home video recording increasing? Two reasons have been mentioned in public discussions: avoidance of commercial advertisements and time shifting. Commercial broadcast stations today charge advertising rates according to the popularity of its particular programming.

And because copyright owners' royalties are tied to audience size, unmeasured time-shifting and commercial advertisement avoidance are important to the program supply industries. This looks merely technical; but it cuts to the very heart of our system for determining broadcast value of films and television programs.

Time-shifting involves the recording of a program for delayed viewing, either because more than one program is being telecast simultaneously which the viewer cares to watch, or because the home taper prefers to spend the broadcast period doing something else. The price of freeing the viewer from the constraints of broadcast scheduling is creating uncertainty in audience measurement by present sampling methods and also risking reduction of audience size for later broadcast reruns.

I have already alluded to the pace of onrushing technological innovation, and the widespread public use of its products, and to the present limited use of video-reproduction equipment by home users. But it is useful to try to visualize how common such reproduction systems will become. At first, in turn, radio, television sets, tape recorders, and now computers were in each case expensive and rare, but became progressively cheaper and common. All except computers are now widely owned in the United States; and, the day of the computer household is not far off. Audiophiles often have within the home "rigs" by which musical works and sound recordings can be captured from transmission, and transferred from any one form of recordings or tapes (reel-to-reel, cartridge, cassette) to any other form. And this simple array will, in time, no doubt be interconnected in the home with wall-size television screens with stereophonic sound and three-dimensional display, and computers with holographic display, plugged in, in turn, to external sources of programs and data bases delvered by DBS, MDS, and cable. You do not have to foretell the exact configuration of the home communications center to sense the scope of the problem.

III. The Legal Situation in the United States.

How are all these diverse interests and activities treated under the 1976 Copyright Act? What structure does it provide to guide market evolution? Section 106 of our new law enumerates five fundamental and exclusive rights. Three of these rights -- distribution of copies and phonorecords, performance, and display -- are limited to public uses. No such limitations are present with respect to the rights of reproduction and adaptation.

The statute sets forth these rights in broad terms, unlimited by general requirements of commerciality or profit, and then provides express and specific limitations, qualifications, and exemptions to these rights in the twelve sections that follow. The very architecture of the statute thus has compelling advantages in explicitly demarcating the legislature's balance between the rights of ownership and the rights of use. By the same token, the statute avoids wholesale exceptions, such as "not-for-profit" uses, which entail too great a risk of eroding the copyright monopoly. Furthermore, it makes possible that claims for additional limitations, qualifications, or exemptions can be subjected to the legislative process, and there assessed upon the whole evidence from all interests, instead of a limited litigation record between a few private parties.

The structure of the statute is central to the home taping issue because of one obvious fact -- none of the twelve sections expressly recognizes home taping as permissible. Instead, attempts to balance interests in this area center around section 107 and our doctrine of fair use of copyrighted works. Regardless of the context -- commercial, non-commercial, educational or private -- the question in the United States so far has boiled down to two lines of inquiry: whether the use is "fair" or infringing, and whether the unqualified right of reproduction in section 106 is inherently limited to exclude

private reproductions.

First, a few words about the doctrine of fair use in United States law.

Fair Use in United States Copyright Law.

For 188 years, before the 1976 Copyright Act came into force, the principle of fair use was devised, applied and elaborated by courts. Some see it as a policy-based defense, or waiver, for infringing use. Others view it as an inherent, in-dwelling limitation on the author's right which, in a given case, bars a conclusion that infringement has occurred. The absence of a statutory definition of fair use may have posed difficulties in applying it prospectively to certain activities; but, as a judicial instrument utilized in litigation, it was a flexible way of adjusting the reach of the copyright monopoly to fit the needs of justice in practical situations. Adding up particular holdings to reach a single definition of "fair use" was, however, a speculative business. It still is.

The new law sets out the principle of fair use in section 107, with four tests (here paraphrased) to guide its application in specific cases: 1) quantity -- that is, how much of the protected work was taken; 2) the nature of the work; 3) the practical substitutability of the copied portions for the original work; 4) and, the possibility or degree of risk that the copy poses to the market for the copyrighted original -- that is, the impact of the copying on the potential market for or value of the work.

The tests were developed from commercial litigation. From a canvass of this litigation as a whole, it appears that in 99% of the reported cases, courts applied "fair use" to assure that the copyright monopoly in one work would not be so over-reaching as to prevent a second, otherwise original,

work from becoming available to the public. Less than a half-dozen cases deal with non-commercial educational uses and only one deals with private, non-commerical reproduction. Yet, under our new law, fair use is the cockpit of conflict over educational and private copying privileges.

Educational Off-Air Taping.

Scattered throughout the law are a number of limited exceptions to the exclusive rights of the copyright owner which involve non-commercial or classroom uses of protected works: for example, archival preservation of audiovisual news reporting and ephemeral recording of non-dramatic literary and musical works in educational broadcasting. But only the doctrine of "fair use" would appear to insulate educators from potential liability for the kinds of off-air recording activities they wish routinely to pursue.

On this question, the Congress, in enacting the 1976 Revision noted only that:

> The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proven difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration ... of the needs and problems of a number of different interests affected and of the various legal problems presented....[T]he Committee....urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights to continue their discussions actively ....

"Guidelines" are a curious U.S. invention. They raise the well-known "Gentlemen's Agreements" to a somewhat higher, publicly endorsed, status. Standing somewhere between these "gentlemen's agreements" and law, they can

symbolize consensus and enhance definiteness in the application of abstract principles like "fair use." They can exercise the kind of influence that one hopes good common sense always has; and they can be changed, as experience exposes their flaws, more readily than legislation can be amended.

In response to the call to the Register by Congress, the Copyright Office and the Ford Foundation jointly sponsored a meeting in 1977 known as the Airlie Conference on Video Recording For Educational Uses. The purposes of this meeting were to bring together the interested parties, to identify the scope of the problem with respect to a variety of affected institutions and to suggest procedures for developing guidelines.

Two years later, during the course of an oversight hearing, Congress selected a small number of individuals drawn from among educators, copyright owner interests, public broadcasting, and artists' guilds to negotiate guidelines on educational fair use of broadcast audiovisual works. After nearly three years of work during which negotiations were stalemated and almost terminated, guidelines have been produced. Their formal announcement is imminent.

I will not belabor you with their details. I'll note only that the thrust of the guidelines is to give individual teachers freedom to make tapes or request that taping be done in more or less spontaneous fashion; that a fixed period for retention and classroom use is permitted, followed by a period during which the work recorded may be evaluated (pre-viewed) for possible longer term retention and use; and express recognition that, for longer term use or retention, the permission of the copyright owner is required.

The negotiation of these guidelines may have been, in some degree, influenced by copyright litigation. In the case of Encyclopedia Britannica

Educational Corp. v. Crooks (known as the "BOCES" case), a preliminary injunction was issued on behalf of the plaintiffs, copyright owners of educational audiovisual works, that enjoined a non-commercial educational media center from systematically video-recording copyrighted programs off-the-air and subsequently distributing the copies to schools in a number of districts. Two crucial facts to be noted were: first, the copying was done at a copying center whenever it determined that a program of educational value was broadcast on television, and the copies then offered to the teachers in the various schools by use of listings in a catalog, and second, the copy center did not require the return of the copy or that it be erased after its use. The court stated:

> The scope of BOCES' activities is difficult to reconcile with its claim of fair use. This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale.

A final decision on the merits of this case is expected soon.

Private Home Recording.

To consider the extent to which "fair use" is applicable to the home recording of television programming in the United States, one must begin with already famous "Betamax" case of Universal Studios, et. al. v. Sony Corp. of America, et. al. That case held that the noncommercial home recording of copyrighted material broadcast over the public airwaves, under the circumstances of the case, was not an infringement and was permissible as fair use under the Copyright Acts of 1909 and 1976. This decision is on appeal to the Court of Appeals for the Ninth Circuit. That court heard oral argument in February of this year but has not yet handed down a decision. Because the case is pending, I do not want to delve into the merits of the litigants' arguments. Several

points about Betamax do, however, raise the question of whether litigation and court decisions can satisfactorily resolve such complex issues. It must be said, however, that the court had to because statutory law may not have.

First, in finding an implied limitation of the exclusive right of reproduction, the court gave significant weight to the legislative history of the Sound Recording Act of 1971, despite the differences in the types of works involved and the different commercial markets for them.

Second, in applying fair use, the court emphasized that the programming involved was broadcast freely over the public airwaves, and expressly refrained from addressing home recording from either pay or cable television. Nor did it rule on the legality of either tape swapping or tape duplication.

Third, the court found that the plaintiffs had failed to establish any present or past harm as a result of off-air taping, and that plaintiff's allegations of potential harm were too speculative to provide a basis for relief.

The Betamax court gave vent to its feeling that the problem was not well-suited to judicial resolution:

> The ramifications of this new technology are greater than the boundaries of this lawsuit. A court reviewing the limited claims of specified parties in a particular factual setting cannot and should not undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences of the videotape recorder.

It also endorsed the following thought from the comparably famous Williams and Wilkins opinion dealing with photocopying:

> The truth is that this is now preeminently a problem for Congress: to decide the extent photocopying should be allowed, the questions of a compulsory license and the payments (if any) to the copyright owners, the system for collecting those payments (lump-sum, clearinghouse, etc.), the special status (if any) of scientific and educational needs. Obviously there is much to be said on all sides. The choices involve economic,

> social, and policy factors which are better sifted by a legislature. The possible, intermediate solutions are also of the pragmatic kinds legislatures, not courts, can and should fashion. But Congress does not appear to have put its mind directly to this problem in 1909, undoubtedly, because the issue was not considered pressing at that time. That statute is, unfortunately, the one we must apply, and under it we have the choice only of thumb's up or thumb's down, for the photocopying practice involved in this litigation, without any real Congressional guidance. Intermediate or compromise solutions are not within our authority.

What does it mean when courts emphasize how little law they are pronouncing, acknowledge how blunt a tool for policy-making litigation is, and glance pointedly at the national legislature? When law, and broad policy, are created judicially -- and make no mistake, in America nowadays they undeniably are so made -- policy emerges piecemeal, by small accretions of precedent; or, in an effort to achieve legislation-like results, courts issue broad declarations which really rest on the particular facts of the given case. These shortcomings need be carefully considered because the courts are already moving to apply the test of fair use to private taping and other copyright problems created by new technologies. The result may be the emergence of broad policies without any clear legislative guidance.

Consider the fourth test of section 107: Earlier fair use cases did not limit, by the principle of fair use, the reach of the copyright owners to redress infringements in forms the author had not employed or in markets not yet entered. In earlier cases, "the potential market" concept under fair use was recognized as being as broad and variable as technical media and marketing imagination would permit. It was the pre-emption of part of the potential exercise of the bundle of exclusive rights which copyright law grants that gave rise to the wrong.

This idea of potential and prospective harm as injury enough to support

redress is no stranger to our law, nor to that of our mother country from which our law is derived. For example, in the well-known Leon case, in 1937, the court rejected the proposition "that wholesale copying ... of copyrighted material can ever be fair use," and invoked Supreme Court authority to the effect that

> "* * * The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property."

The Leon court resorted to a 1910 English case which had declared that "[a]fter all copyright is property, and an action will lie even if no damage is shown," and, more relevantly here, found that infringers had injured the copyright owners if "in no other way," by depriving them "of the advantage, which the copyright conferred on them, of being able to publish such a book as the defendants' book at much less labor and expense than anyone else."

The import is that potential markets may be as valuable as those presently exploited. Too narrow a view of adverse market impact may simply have the effect of destroying anticipated markets.

At this point, it is well to turn our eyes to the exact words of section 107. In the statutory formulation, the commercial harm aspect of the fair use doctrine is stated to be:

> (4) the effect of the use upon the potential market for or value of the copyrighted work. (Emphasis supplied)

Thus, the statute itself focusses upon the "potential" -- i.e., prospective, and predictable market -- not merely present, immediate, and demonstrable harm. In this respect, the statute tells us that strain of Anglo-American law represented by Leon and other cases must be heeded. To read potential out of the statute is to gut its meaning.

A relatively small number of households with videotaping equipment may

not be enough to create immediate palpable harm to copyright owners -- whether one views markets broadly or narrowly. But a national viewing public which has integrated videocassette technology into its home entertainment habits is, cumulatively, quite another thing. A single family making a single copy of a free television program may not seem too much; but, as one observer remarked: "Babies are born one at a time, but can result in overpopulation."

The copyright scene is filled with efforts to retrieve rights against user practices which, beginning small, have gradually increased, and finally become widespread. Copyright owners have over the years been less than zealous in asserting whatever rights they may have with respect to home audio taping. In retrospect, this fact has impaired similar efforts in the videotaping arena.

The legislative history of the Sound Recording Act of 1971, cited by the Betamax court, is muddled on the off-air taping issue. That legislation was intended to thwart the increasing commercial piracy of phonorecords through statutory recognition of a limited copyright in published sound recordings. The possible relevance of this legislation to personal home taping, while not specifically addressed in the Report of the Senate Judiciary Committee, was noted by the Judiciary Committee of the House of Representatives:

> Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.

Bear in mind that at that time video recording, as distinguished from audio taping, was in its infancy and not commercially significant. Therefore, in canvassing the legislative history of both the Sound Recording Act and the

General Revision, the question should be considered, separately with respect to home audio and video taping, whether the Congress decided the scope of the reproduction right of section 106 with respect to home video taping or left the question open. Even if the lower court decision in Betamax stands, that will not be the end of the affair. Legislatures in a few countries have begun to confront the copyright aspects of home taping, and there are stirrings in the United States as well. (I will not here treat in detail whether and how the international conventions bear upon home-taping, for that question has been examined recently before your organization by Mihaly Ficsor.)

That the international copyright community has recognized that legislation, not case-by-case adjudication, is necessary to deal with home video recording is beyond doubt. Joint Subcommittees of the Intergovernmental Copyright Committee and the Berne Executive Committee on the Legal Problems Arising from the Use of Video-Cassettes and Audio-Visual Discs have jointly called attention to global compensation systems that could provide revenue for all rights holders from both home audio and video recording. In so doing, they generally confirmed the recommendations of the Working Group of Experts which urged legislation to prevent inevitable harm to creators. The emphasis of both the Working Group and the Joint Subcommittees fixed on the idea of a levy upon either videotape hardware or blank cassettes. As was pointed out at the Subcommittee meetings, whether or not one calls this a tax, levy or fee, it must be recognized that its essence is a license.

Doubtlessly the interest over a levy -- a global compensation system -- is partly due to the tremendous difficultues of enforcing private rights in private homes. However, the fact that several states have, or are considering, this system raises hopes that experience will demonstrate its

political feasibility and its justice to the public and creators. The jury is, however, still out.

The German Copyright Act, which was enacted September 9, 1965, and went into effect January 1, 1966, contains the first legislative provision which provides compensation to copyright owners for the private home audio and video taping of their protected works. As a pioneering effort, it has attracted great interest and considerable commentary. Already, on the basis of experience under the law, amendments to it have been proposed. And I shall leave to the better informed, including Dr. Kreile, to discuss the present law and proposed changes, as well as the new Austrian law.

The British government recently published its "Green Paper" relating to copyright, designs, and performers' protection. Without drawing any final conclusions, the paper noted that the government "has still not received convincing evidence that the introduction of a levy on audio or video equipment or blank tape would provide an acceptable solution to the problems or potential problems." The document did suggest, however, that the industries continue research "aimed at finding a technological solution to the problem." It further offered to consider supporting legislation making illegal any anti-spoiler devices which might be developed to circumvent technological solutions. Although it may be possible for spoiler devices to discourage home taping in the short term, it appears likely that the only result from building a better mousetrap in the form of spoiler devices will be the education of smarter mice.

Legislation of the German and Austrian types has its defenders and detractors. Whatever their defects, the German and Austrian laws are grounded on a crucial premise: copyright owners need not demonstrate serious market damage <u>before</u> some form of protection or remuneration will be provided.

In the United States, there is not yet any Congressional action on this question, but there is no doubt in my mind that academicians, copyright specialists, broadcasters, creators of television programs and the professional unions are beginning to stir. In the United States, off-air educational taping absorbed our attentions first; the time to deal with home taping is fast approaching.

As I see it, in the United States we should move on the legislative front on home taping. I would rather heed our courts' calls for legislative solutions than attack their efforts to discharge their duty. There are even more severe tests ahead to our commitment to copyright, and our ability to adapt copyright to innovation of market change. Remember the home communications center of the future, where data, images, and performances will all flood into the consumers' home entertainment and information center with all its capabilities. What then becomes of the bundle of rights? Where then is the box office? Our response to the problems of home taping will test our resolve to enrich society by rewarding and protecting authors, and our ingenuity in fashioning adaptations for copyright as ingenious as the innovations in technology itself. And the experience will be needed in the later tests to come.